



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 210205-0013]

RIN 0648-BK25

Magnuson-Stevens Act Provisions; Fisheries off West Coast States; Pacific Coast Groundfish Fishery; 2021 Harvest Specifications for Pacific Whiting, and 2021 Pacific Whiting Tribal Allocation

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues the proposed rule for the 2021 Pacific whiting fishery under the authority of the Pacific Coast Groundfish Fishery Management Plan, the Magnuson-Stevens Fishery Conservation and Management Act, the Pacific Whiting Act of 2006, and other applicable laws. This proposed rule would allocate 17.5 percent of the U.S. total allowable catch of Pacific whiting for 2021 to Pacific Coast Indian tribes that have a treaty right to harvest groundfish, and implement set-asides for Pacific whiting research and incidental mortality in other fisheries. The proposed measures are intended to help prevent overfishing, achieve optimum yield, and ensure that management measures are based on the best scientific information available.

DATES: Comments on this proposed rule must be received no later than *[Insert date 30 days after date of publication in the FEDERAL REGISTER]*.

ADDRESSES: You may submit comments on this document, identified by NOAA-NMFS-2021-0002 by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal eRulemaking Portal. Go to www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2021-0002 click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.

- *Mail:* Barry Thom, % Stacey Miller, Sustainable Fisheries Division, West Coast Region, NMFS, 1201 NE Lloyd Blvd. Suite 1100, Portland, OR 97232.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (*e.g.*, name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

Electronic Access

This proposed rule is accessible via the Internet at the Office of the Federal Register website at <https://www.federalregister.gov>. Background information and documents are available at the NMFS website at <https://www.fisheries.noaa.gov> and at the Pacific Fishery Management Council's website at <http://www.pcouncil.org/>.

FOR FURTHER INFORMATION CONTACT: Stacey Miller, phone: 503-231-6290, and e-mail: Stacey.Miller@noaa.gov.

SUPPLEMENTARY INFORMATION:

Background

This rule proposes establishing the 2021 set-asides for research and incidental mortality of Pacific whiting as recommended by the Pacific Fishery Management Council

(Council) and the 2021 tribal allocation for the Pacific whiting fishery. The allocations for Pacific whiting would be effective until December 31, 2021.

The transboundary stock of Pacific whiting is managed through the Agreement Between the Government of the United States of America and the Government of Canada on Pacific Hake / Whiting of 2003 (Agreement). The Agreement establishes bilateral bodies to implement the terms of the Agreement. The bilateral bodies include: The Joint Management Committee (JMC), which recommends the annual catch level for Pacific whiting; the Joint Technical Committee (JTC), which conducts the Pacific whiting stock assessment; the Scientific Review Group (SRG), which reviews the stock assessment; and the Advisory Panel (AP), which provides stakeholder input to the JMC.

The Agreement establishes a default harvest policy of F=40 percent, which means a fishing mortality rate that would reduce the spawning biomass to 40 percent of the estimated unfished level. The Agreement also allocates 73.88 percent of the Pacific whiting total allowable catch (TAC) to the United States and 26.12 percent of the TAC to Canada. Based on recommendations from the Treaty's JTC, SRG, and AP, the JMC determines the overall Pacific whiting TAC by March 25th of each year, which is subsequently approved by NMFS, under the delegation of authority from the Secretary of Commerce.

The final rule will announce the total 2021 U.S. TAC and establish the 2021 tribal allocation and non-tribal fishery harvest guideline (HG), also called the non-tribal allocation. To determine the HG, the 2021 tribal allocation and set-aside for research and incidental mortality are deducted from the total U.S. TAC. The HG is then allocated among the three non-tribal sectors of the Pacific whiting fishery: the catcher/processor (C/P) Coop Program, the Mothership (MS) Coop Program and the Shorebased Individual Fishing Quota (IFQ) Program. The HG is not included in this proposed rule due to the timing of the SRG and JMC meetings when the 2021 overall TAC will be determined by

the JMC, and subsequently approved by the Secretary of Commerce, with the concurrence of the Department of State.

Tribal Allocations

The regulations at 50 CFR 660.50(d) identify the procedures for implementing the treaty rights that Pacific Coast treaty Indian tribes have to harvest groundfish in their usual and accustomed fishing areas in U.S. waters. Tribes with treaty fishing rights in the area covered by the Pacific Coast Groundfish FMP request allocations, set-asides, or regulations specific to the tribes during the Council’s biennial harvest specifications and management measures process. The regulations state that the Secretary will develop tribal allocations and regulations in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus.

NMFS allocates a portion of the U.S. TAC of Pacific whiting to the tribal fishery, following the process established in 50 CFR 660.50(d). The tribal allocation is subtracted from the U.S. Pacific whiting TAC before allocation to the non-tribal sectors.

Four Washington coastal treaty Indian tribes including the Makah Indian Tribe, Quileute Indian Tribe, Quinault Indian Nation, and the Hoh Indian Tribe (collectively, the “Treaty Tribes”), can participate in the tribal Pacific whiting fishery. Tribal allocations of Pacific whiting have been based on discussions with the Treaty Tribes regarding their intent for those fishing years. The Hoh Tribe has not expressed an interest in participating in the Pacific whiting fishery to date. The Quileute Tribe and Quinault Indian Nation have expressed interest in beginning to participate in the Pacific whiting fishery at a future date. To date, only the Makah Tribe has prosecuted a tribal fishery for Pacific whiting, and has harvested Pacific whiting since 1996 using midwater trawl gear. Table 1 below provides a recent history of U.S. TACs and annual tribal allocation in metric tons (mt).

Table 1 -- U.S. Total Allowable Catch and Annual Tribal Allocation in Metric Tons (mt)

| <u>Year</u> | <u>U.S. TAC ¹</u> | <u>Tribal Allocation</u> |
|-------------|------------------------------|--------------------------|
| 2010 | 193,935 mt | 49,939 mt |
| 2011 | 290,903 mt | 66,908 mt |
| 2012 | 186,037 mt | 48,556 mt |
| 2013 | 269,745 mt | 63,205 mt |
| 2014 | 316,206 mt | 55,336 mt |
| 2015 | 325,072 mt | 56,888 mt |
| 2016 | 367,553 mt | 64,322 mt |
| 2017 | 441,433 mt | 77,251 mt |
| 2018 | 441,433 mt | 77,251 mt |
| 2019 | 441,433 mt | 77,251 mt |
| 2020 | 424,810 mt | 74,342 mt |

¹ Beginning in 2012, the United States started using the term Total Allowable Catch, or TAC, based on the Agreement between the Government of the United States of America and the Government of Canada on Pacific Hake/Whiting. Prior to 2012, the terms Optimal Yield (OY) and Annual Catch Limit (ACL) were used.

In 2009, NMFS, the states of Washington and Oregon, and the Treaty Tribes started a process to determine the long-term tribal allocation for Pacific whiting. However, these groups have not yet determined a long-term allocation. In order to ensure Treaty Tribes continue to receive allocations, this rule proposes the 2021 tribal allocation of Pacific whiting. This allocation is not intended to set precedent for future allocations.

In exchanges between NMFS and the Treaty Tribes during November and December 2020, the Makah Tribe indicated their intent to participate in the tribal Pacific whiting fishery in 2021 and requested 17.5 percent of the U.S. TAC. The Quinault Indian Nation, Quileute Indian Tribe and Hoh Indian Tribe informed NMFS in December 2020 that they will not participate in the 2021 fishery. NMFS will contact the Tribes during the proposed rule comment period to refine the 2021 allocation before allocating the final U.S. TAC between the tribal and non-tribal whiting fisheries. NMFS proposes a tribal allocation that accommodates the tribal request, specifically 17.5 percent of the U.S. TAC. NMFS has determined that the current scientific information regarding the distribution and abundance of the coastal Pacific whiting stock indicates the 17.5 percent is within the range of the tribal treaty right to Pacific whiting.

The JMC is anticipated to recommend the overall and corresponding U.S./Canada TACs no later than March 25, 2021. The U.S. TAC is 73.88 percent of the overall TAC. Until this TAC is set, NMFS cannot propose a specific amount for the tribal allocation. The Pacific whiting fishery begins on May 15, and we expect to publish the final rule to set Pacific whiting specifications for 2021 by early May. Therefore, to allow for public input on the tribal allocation, NMFS is issuing this proposed rule without the final 2021 TAC. However, to provide a basis for public input, NMFS is describing a range of potential tribal allocations in this proposed rule by applying the proposed tribal allocation to a range of potential TACs derived from past harvest levels.

In order to project a range of potential tribal allocations for 2021, we applied the proposed tribal allocation of 17.5 percent to the range of U.S. TACs over the last 10 years, 2011 through 2020 (plus or minus 25 percent to capture variability in stock abundance). The range of U.S. TACs in that time period was 186,037 mt (2012) to 441,433 mt (2017, 2018 and 2019). Applying the 25 percent variability results in a range of potential TACs of 139,527 mt to 551,791 mt for 2021. Using the proposed tribal allocation of 17.5 percent, the potential range of the tribal allocations for 2021 would be between 24,417 mt and 96,563 mt.

Non-Tribal Research and Bycatch Set-Asides

The U.S. non-tribal whiting fishery is managed under the Council's Pacific Coast Groundfish FMP. Each year, the Council recommends the amount of Pacific whiting to accommodate incidental mortality of Pacific whiting in research activities and non-groundfish fisheries based on estimates of scientific research catch and estimated bycatch mortality in non-groundfish fisheries. At its November 2020 meeting, the Council recommended an incidental mortality set-aside of 750 mt for 2021. This is a reduction of the amount set-aside for research and incidental mortality from 1,500 mt in 2020. The 750 mt recommendation, however, reflects the recent 3 year average mortality that has

declined from 942 mt in 2014-2016 to 216 mt in 2017-2019. This rule proposes the Council's recommendations.

This proposed rule would be implemented under the statutory and regulatory authority of section 304(b) and 305(d) of the Magnuson-Stevens Act, and the Pacific Whiting Act of 2006. With this proposed rule, NMFS, acting on behalf of the Secretary, would ensure that the FMP is implemented in a manner consistent with treaty rights of four Treaty Tribes to fish in their "usual and accustomed grounds and stations" in common with non-tribal citizens. *United States v. Washington*, 384 F. Supp. 313 (W.D. 1974).

Classification

Pursuant to section 304 (b)(1)(A) and 305 (d) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the Pacific Coast Groundfish FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment. In making its final determination, NMFS will take into account the complete record, including the data, views, and comments received during the comment period.

Pursuant to Executive Order 13175, this proposed rule was developed after meaningful consultation and collaboration with tribal officials from the area covered by the Pacific Coast Groundfish FMP. Under the Magnuson-Stevens Act at 16 U.S.C. 1852(b)(5), one of the voting members of the Pacific Council must be a representative of an Indian tribe with federally recognized fishing rights from the area of the Council's jurisdiction. In addition, regulations implementing the Pacific Coast Groundfish FMP establish a procedure by which the tribes with treaty fishing rights in the area covered by the Pacific Coast Groundfish FMP request new allocations or regulations specific to the tribes, in writing, before the first of the two meetings at which the Council considers groundfish management measures. The regulations at 50 CFR 660.324(d) further state,

“the Secretary will develop tribal allocations and regulations under this paragraph in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus.”

The tribal management measures in this proposed rule have been developed following these procedures.

The Office of Management and Budget has determined that this proposed rule is not significant for purposes of Executive Order 12866.

An Initial Regulatory Flexibility Analyses (IRFA) were prepared for this action, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action is contained in the **SUMMARY** section and at the beginning of the **SUPPLEMENTARY INFORMATION** section of the preamble. A summary of the IRFA follow. Copies of the IRFAs are available from NMFS (See **ADDRESSES**).

Under the RFA, the term “small entities” includes small businesses, small organizations, and small governmental jurisdictions. The Small Business Administration has established size criteria for entities involved in the fishing industry that qualify as small businesses. A business involved in fish harvesting is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has combined annual receipts, not in excess of \$11 million for all its affiliated operations worldwide (see 80 FR 81194, December 29, 2015). A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide. For marinas and charter/party boats, a small business now defined as one with annual receipts, not in excess of \$7.5 million. A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide. A small

organization is any nonprofit enterprise that is independently owned and operated and is not dominant in its field. Small governmental jurisdictions such as governments of cities, counties, towns, townships, villages, school districts, or special districts are considered small jurisdictions if their populations are less than 50,000. Effective February 26, 2016, a seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 750 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide (See NAICS 311710 at 81 FR 4469; January 26, 2016). For purposes of rulemaking, NMFS is also applying the seafood processor standard to catcher processors because whiting C/Ps earn the majority of the revenue from processed seafood product.

Description and Estimate of the Number of Small Entities to which the Rule Applies, and Estimate of Economic Impacts by Entity Size and Industry

This proposed rule would affect how Pacific whiting is allocated to the following sectors/programs: Tribal, Shorebased IFQ Program Trawl Fishery, MS Coop Program Whiting At-sea Trawl Fishery, and C/P Coop Program Whiting At-sea Trawl Fishery. The amount of Pacific whiting allocated to these sectors is based on the U.S. TAC.

We expect one tribal entity to fish for Pacific whiting in 2021. Tribes are not considered small entities for the purposes of RFA. Impacts to tribes are nevertheless considered in this analysis. As of January 2021, the Shorebased IFQ Program is composed of 166 Quota Share permits/accounts (134 of which were allocated whiting quota pounds), and 35 first receivers, one of which is designated as whiting-only receivers and 11 that may receive both whiting and non-whiting. These regulations also directly affect participants in the MS Co-op Program, a general term to describe the limited access program that applies to eligible harvesters and processors in the MS sector of the Pacific whiting at-sea trawl fishery. This program consists of six MS processor permits, and a catcher vessel fleet currently composed of a single co-op, with 34

Mothership/Catcher Vessel (MS/CV) endorsed permits (with three permits each having two catch history assignments). These regulations also directly affect the C/P Co-op Program, composed of 10 C/P endorsed permits owned by three companies that have formed a single coop. These co-ops are considered large entities from several perspectives; they have participants that are large entities, and have in total more than 750 employees worldwide including affiliates. Although there are three non-tribal sectors, many companies participate in two sectors and some participate in all three sectors. As part of the permit application processes for the non-tribal fisheries, based on a review of the Small Business Administration size criteria, permit applicants are asked if they considered themselves a “small” business, and they are asked to provide detailed ownership information. Data on employment worldwide, including affiliates, are not available for these companies, which generally operate in Alaska as well as the West Coast and may have operations in other countries as well. NMFS has limited entry permit holders self-report size status. For 2021, all 10 CP permits reported they are not small businesses, as did 8 mothership catcher vessels. There is substantial, but not complete overlap between permit ownership and vessel ownership so there may be a small number of additional small entity vessel owners who will be impacted by this rule. After accounting for cross participation, multiple Quota Share account holders, and affiliation through ownership, NMFS estimates that there are 103 non-tribal entities directly affected by these proposed regulations, 89 of which are considered “small” businesses.

This rule will allocate Pacific whiting between tribal and non-tribal harvesters (a mixture of small and large businesses). Tribal fisheries consist of a mixture of fishing activities that are similar to the activities that non-tribal fisheries undertake. Tribal harvests may be delivered to both shoreside plants and motherships for processing. These processing facilities also process fish harvested by non-tribal fisheries. The effect of the tribal allocation on non-tribal fisheries will depend on the level of tribal harvests

relative to their allocation and the reapportionment process. If the tribes do not harvest their entire allocation, there are opportunities during the year to reapportion unharvested tribal amounts to the non-tribal fleets. For example, in 2020 NMFS reapportioned 40,000 mt of the original 74,342 mt tribal allocation. This reapportionment was based on conversations with the tribes and the best information available at the time, which indicated that this amount would not limit tribal harvest opportunities for the remainder of the year. The reapportioning process allows unharvested tribal allocations of Pacific whiting to be fished by the non-tribal fleets, benefitting both large and small entities. The revised Pacific whiting allocations for 2020 following the reapportionment were: Tribal 34,342 mt, C/P Co-op 132,249 mt; MS Co-op 93,352 mt; and Shorebased IFQ Program 163,367 mt.

The prices for Pacific whiting are largely determined by the world market because most of the Pacific whiting harvested in the U.S. is exported. The U.S. Pacific whiting TAC is highly variable, as have subsequent harvests and ex-vessel revenues. For the years 2016 to 2020, the total Pacific whiting fishery (tribal and non-tribal) averaged harvests of approximately 303,782 mt annually. The 2020 U.S. non-tribal fishery had a Pacific whiting catch of approximately 287,400 mt, and the tribal fishery landed less than 200 mt.

Impacts to tribal catcher vessels who elect to participate in the tribal fishery are measured with an estimate of ex-vessel revenue. In lieu of more complete information on tribal deliveries, total ex-vessel revenue is estimated with the 2020 average shoreside ex-vessel price of Pacific whiting, which was \$154 per mt. At that price, the proposed 2020 tribal allocation (potentially 24,417 mt – 96,563 mt) would have an ex-vessel value between \$3.8 million and \$14.9 million.

A Description of any Significant Alternatives to the Proposed Rule that Accomplish the Stated Objectives of Applicable Statutes and that Minimize any Significant Economic Impact of the Proposed Rule on Small Entities

NMFS considered two alternatives for the Pacific whiting action: the “No Action” and the “Proposed Action.” NMFS did not consider a broader range of alternatives to the proposed allocation. The tribal allocation is based primarily on the requests of the tribes. These requests reflect the level of participation in the fishery that will allow them to exercise their treaty right to fish for Pacific whiting. Under the Proposed Action alternative, NMFS proposes to set the tribal allocation percentage at 17.5 percent, as requested by the Tribes. This would yield a tribal allocation of between 24,417 mt and 96,563 mt for 2021. Consideration of a percentage lower than the tribal request of 17.5 percent is not appropriate in this instance. As a matter of policy, NMFS has historically supported the harvest levels requested by the Tribes. Based on the information available to NMFS, the tribal request is within their tribal treaty rights. A higher percentage would arguably also be within the scope of the treaty right. However, a higher percentage would unnecessarily limit the non-tribal fishery.

Under the no action alternative, NMFS would not make an allocation to the tribal sector. This alternative was considered, but the regulatory framework provides for a tribal allocation on an annual basis only. Therefore, the no action alternative would result in no allocation of Pacific whiting to the tribal sector in 2021, which would be inconsistent with NMFS’ responsibility to manage the fishery consistent with the Tribes’ treaty rights. Given that there is a tribal request for allocation in 2021, this alternative received no further consideration.

Regulatory Flexibility Act Determination of No Significant Impact

NMFS determined this proposed rule would not adversely affect small entities. The reapportioning process allows unharvested tribal allocations of Pacific whiting,

fished by small entities, to be fished by the non-tribal fleets, benefitting both large and small entities.

NMFS has prepared an IRFA and is requesting comments on this conclusion. See

ADDRESSES.

This proposed rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

No Federal rules have been identified that duplicate, overlap, or conflict with this action.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Indian Fisheries.

Dated: February 8, 2021.

Samuel D. Rauch III,
Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 660 is proposed to be amended as follows:

PART 660—FISHERIES OFF WEST COAST STATES

1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*, 16 U.S.C. 773 *et seq.*, and 16 U.S.C. 7001 *et seq.*

2. In § 660.50, revise paragraph (f)(4) to read as follows:

§ 660.50 Pacific Coast treaty Indian fisheries.

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(f) * * *

(4) *Pacific whiting*. The tribal allocation for 2021 will be 17.5 percent of the U.S.

TAC.

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[FR Doc. 2021-02814 Filed: 2/12/2021 8:45 am; Publication Date: 2/16/2021]